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No. 07-144

IN THE

Supreme Court of the United States

JEANNETTE A. BISNO AND ROBERT H. BISNO, INDIVIDUALLY; AND DOES 1 THROUGH 25, INCLUSIVE, PETITIONERS

v.

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC., A CALIFORNIA NON-PROFIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

SUPPLEMENTAL STATEMENT 5

CONCLUSION 10

SUPPLEMENTAL APPENDIX 1sa

TABLE OF AUTHORITIES

Page

CASES

CRESPIN V. SHEWRY, 125 CAL.APP.4TH 259, 269 (2004) 4

IN RE MURCHISON, 349 U.S. 133, 136 (1955) 3

RICE V. SIOUX CITY MEMORIAL PARK CEMETERY, INC., 349 U.S. 70 (1953) 2

TUMEY V. OHIO, 273 U.S. 510, 522 (1927) 3

WARD V. VILLAGE OF MONROEVILLE, 409 U.S. 57, 61 (1972) 3

RULES

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 904.1(a)(1) 7, 10

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 904.1(a)(6) 7, 8, 9

SUPREME COURT RULE 32(3) 5

INTRODUCTION

Respondent North Beverly Park Homeowners Association ("Association") urges in its Opposition to the Petition of Jeannette and Robert Bisno (the "Bisnos") that this case supposedly presents "a factually unique situation that is essentially of importance only to Petitioners," and that does not present a real constitutional issue. But the issue presented by the Petition -- the right to a fundamentally fair tribunal -- is the very essence of due process, and since the proceedings below leave intact a published opinion which unfairly and erroneously denies access to a fair tribunal, it will also affect both future cases and public confidence in our judicial system.

Respondent Association does not challenge the recent medical studies cited in the Petition. The increasing impact of Alzheimer's and other dementia diseases on the judiciary is as statistically inevitable as its alarming rise in the general population. The issue of whether a litigant is constitutionally entitled to a mentally competent judge -- including a reasonable right to discover information about when mental disease may have first manifested itself -- is squarely before the Court in this petition.

The record shows that a descending cloud of mental impairment quite likely tainted the Bisnos' constitutional right to a fair tribunal. Some fifty other cases tainted by the mental impairment of Judge Nelson, without question or argument, were offered remedy by the Los Angeles County Superior Court. However, the Bisnos' basic due process rights were trampled for the expediency of avoiding retrial, or to avoid having to grapple with "the can of worms" of judicial officer privacy.

The Bisnos specifically and timely raised these constitutional issues before the California trial and appellate courts. The appellate court simply avoided the issue by erroneously re-characterizing the original interlocutory appeal as an appeal from a "final judgment." But this case

was not finally adjudicated at the time of appeal, and it remains so today.

It is undisputed that the trial judge suffered a mental illness – the California Commission on Judicial Performance started proceedings to remove him – and there was sufficient evidence to order retrial, or at least to allow discovery to determine if the onset of mental disease occurred at a time when it may have tainted the original trial. The refusal of the California courts to do so offends basic constitutional due process precepts.

This Court decides the hard cases, including cases where an important constitutional issue is squarely presented. As this Court indicated in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1953), avoidance of a constitutional issue may constitute evasion of this Court's responsibility. For this reason, the Petition for Certiorari merits consideration by this Court to provide national guidance on this critical issue concerning state judicial tribunals.[1]

ARGUMENT

I. This Court's Jurisprudence Regarding Judicial Officer Bias And Conflict Of Interest Counsels That The Mental Incapacity Of A Judicial Officer Should Be Liberally Remedied To Maintain The Public's Confidence In Its Judiciary

The competence of a judge is no less important than any other factor affecting the fairness of a bench trial. The Petition at page 17 sets forth representative cases of this Court's robust case law regarding judicial officers with bias

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[1] The Bisnos are aware that several bar and justice advocacy organizations are interested in this significant administration of justice issue and are considering filing motions to file amicus curiae briefs. Such motions are likely to be made no later than mid-October.

or conflicts of interest. In cases like *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); *In re Murchison*, 349 U.S. 133, 136 (1955); and *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972), this Court has heavily drawn the line in favor of preserving the public's confidence in the judicial system if there is possible bias or conflict of interest.

The public policy underlying this line of cases is indistinguishable from cases where mental incapacity may have impaired a judicial officer. Decisions not yet final and made under such disability must be set aside and retried – and this Court's province is balancing the constitutional interests. Allowing states to operate judicial systems where decisions likely tainted by mental incapacity of a judicial officer remain standing offends the United States Constitution's 14th Amendment Due Process Clause.

II. The Association Makes A Red Herring Argument About Finality Issues And Its Contention That The Permanent Injunction Order Became Final Upon Remittitur Is Factually And Legally Unsupported.

The Association's Opposition says the injunction order supposedly constituted a final judgment rather than an interlocutory order, but that argument is not only irrelevant to the issues presented by this Petition, it is factually inaccurate.

The Statement of the Case in the Petition accurately summarizes the state of the record: *The first appeal was interlocutory because the case was not fully adjudicated in the state trial court, and so the Bisnos timely objected to Judge Nelson's mental incapacity under the California disqualification statute.* The Association's Opposition objects to this Petition on technical procedural grounds by falsely portraying the first appeal as taken as an appeal of a final judgment instead of an interlocutory appeal of the grant of the permanent injunction.

A. The Supplemental Statement Of The Case, Set Forth In Detail Below, Establishes That The First Appeal Was Interlocutory And Not Taken From A Final Judgment.

The Association's Statement of the Case is misleading. While it accurately points out that the Bisnos' cross-complaint was dismissed prior to entry of the judgment granting the permanent injunction, the Association does not disclose to this Court the existence of the still-pending consolidated complaint for breach of fiduciary duty. This complaint was a separate lawsuit filed by the Bisnos against the Association and it was consolidated into this case.[2] Therefore, the record clearly establishes the interlocutory character of the first appeal, despite the efforts of the Association to conceal that fact from this Court.

B. California Case Law Establishes That No Injunction Is Final If There Is A Change Of Circumstances, Law, Or Other Grounds For Which Justice Demands Modification Or Dissolution.

Even if the grant of an injunction is subjected to appellate review in California, state law establishes that a permanent injunction, granted in equity, is always subject to modification or dissolution for good cause. Cause for modification or dissolution of an injunction includes a material change of circumstances, a change in the law, or other ground in which justice demands modification or dissolution of the "permanent" injunction. *See Crespin v. Shewry*, 125 Cal.App.4th 259, 269 (2004). Thus, even if the appeal of the original injunction were somehow "final," change or dissolution of the injunction based upon changed

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[2] The procedural details are below in the Supplemental Statement of the Case.

circumstances or other grounds that justice demands is always possible.

SUPPLEMENTAL STATEMENT

This case had three operative pleadings.[3] The Association initiated this lawsuit (Los Angeles Superior Court Case No. BC 275 041) for monetary damages and injunction against the Bisnos. (Appellant's Appendix at pp. 1-7.)[4] The Bisnos filed a cross-complaint that would have required a jury trial.[5] In addition, Bisnos filed a separate lawsuit (Los Angeles County Superior Court Case No. BC 288 585) against the Association for monetary damages arising out of alleged breaches of fiduciary duty.[6] The separate lawsuit was consolidated into this case.

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[3] Because none of the operative pleadings were at issue in the first appeal of the injunction or the second appeal over the disqualification of Judge Nelson, only the original complaint is in the appellate appendices. The other documents remain in the files of the Los Angeles County Superior Court. The court docket and pdf scans of the files are available for viewing online at http://www.lasuperiorcourt.org/civil/ by going to the "Case Summary" page and entering the case number "BC 275 041" or the consolidated case number 'BC 288 585". While viewing the docket online is free, there is a charge for viewing and printing documents. Therefore, pursuant to Supreme Court Rule 32(3), Petitioner's counsel is concurrently filing a letter to the Court proposing to lodge copies of these trial court operative pleadings that were not contemplated as relevant by the parties until the California Court of Appeal erroneously re-characterized the first appeal as taken from a final judgment.

[4] Hereinafter citations to the Appellant's Appendix shall be "(A.A. at p. ___.)"

[5] The third amended cross-complaint and supplemental complaint, an operative pleading until dismissed on April 5, 2004, is viewable online and is proposed for lodging with this Court as set forth in footnote 3, *supra*.

[6] The existence of the consolidated case also is noted in two places in the appendix of the Opposition filed by the Association. See Opposition,

On the eve of the trial, the Association waived all of its monetary damages claims leaving only the injunctive relief claim for a bench trial. (Respondent's Brief, First Appeal at p. 8.)[5] On the day the bench trial began, counsel for the parties and Judge Nelson had this exchange:

> Mr. Hicks: Your Honor, also before the opening statement starts, I just want to make sure we all know the scope of this trial. I understood and so did my co-counsel from your ruling last Friday that first there would be a trial of the Association's complaint.
> The Court: Right.
> Mr. Hicks: Then there would be a separate trial on the brief (sic) of fiduciary duty claim. And then there would be a separate trial on the jury issues. I just want to make sure that that's . . .
> The Court: I think that's right.
> Ms. Parga: Yes, your Honor.
> (Respondent's Appendix, Second Appeal, pp. 107-108.)

As set forth in the Petition's Statement, the trial court, after a bench trial, granted a permanent injunction against the Bisnos.

On April 5, 2004, the Bisnos dismissed their cross-complaint filed in this case, ***but not the consolidated complaint for breach of fiduciary duty***. (Opposition, App. at pp. 1a-5a.) On June 30, 2004, the trial court entered a minute order resolving a matter of costs and attorneys fees and,

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App. at pp. 1a & 6a. The consolidated first amended complaint for breach of fiduciary duty, an operative pleading still awaiting trial, is viewable online and is proposed for lodging with this Court as set forth in footnote 3, *supra*.

[5] The Respondent's Brief, First Appeal, is in the appellate record of the California Court of Appeal under appellate case number B 175173.

aware that notice of appeal had been filed regarding the permanent injunction order, the trial court ordered that the "cross-complaint" be stayed until disposition of the appeal on the permanent injunction.[6] (Appellant's Petition for Rehearing Before the California Court of Appeal, Second Appeal and Appellant's Motion to Augment the Record, Second Appeal.)

On July 6, 2004, Bisnos filed a Notice of Appeal of the injunction order under California Code of Civil Procedure section 904.1(a)(6) that allows immediate appeals of the grant or denial of injunctions. (App., *infra*, 1sa.)[7] Due to the remaining pending matters in the trial court, the Notice of Appeal was not and could not be taken under California Code of Civil Procedure section 904.1(a)(1) which allows appeals only from final judgments.

During appellate briefing of the first appeal, ***before it was an issue in this case***, counsel for the Association concluded her Statement of the Case in the Respondent's Brief as follows:

> "Appellants' complaint for breach of fiduciary duty, which had been consolidated with Respondent's action, remains to be tried." (Respondent's Brief, First Appeal at p. 10.)

Thus, the Respondent Association itself correctly stated the interlocutory nature of the appeal in the Procedural

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[6] Although Judge Nelson ordered that trial of the "cross-complaint" be stayed until resolution of the appeal of the injunction, at the time of his June 30, 2004 minute order, the actual cross-complaint had been dismissed by the Bisnos. As the consolidated complaint is of the nature of a cross-complaint once consolidated into the Association's case, the parties clearly understood that Judge Nelson, in using the term "cross-complaint" in the minute order, was referring to the still-pending complaint for breach of fiduciary duty.

[7] The Appendix to this Reply will be cited as "(App., *infra*, __sa.)

Background section of its own brief during the original appeal. Ultimately, the Court of Appeal issued an opinion affirming Judge Nelson's order. (Opposition App. at 14a-47a.) However, at that time, none of the parties or the Court of Appeal was aware of Judge Nelson's medical condition.

The decision of the Court of Appeal accurately summarized the resolution of the Association's complaint, including a statement that at the time of the trial court's Statement of Intended Decision, "[a]ll alleged disputes between Bisnos and the Association were moot, except the installation of the sculpture and gates."[8] (Opposition, App. at p. 17a.) The Court of Appeal decision also accurately identified that appeal as taken under only California Code of Civil Procedure section 904.1(a)(6). (*Id.*) The Court of Appeal's opinion had no discussion of the dismissal of the Bisnos' cross-complaint or the pending consolidated first amended complaint for breach of fiduciary duty.

After the California Supreme Court denied discretionary review of the Court of Appeal's decision, the first interlocutory appeal went back down to the trial court on remittitur. It was soon thereafter that counsel for Bisnos learned from another attorney that the State Commission on Judicial Performance had commenced proceedings to remove Judge Nelson from the bench for degenerative brain disease, that Judge Nelson was absent from Department 46 on administrative leave, and that statements of disqualification filed in other cases were resulting in the Los Angeles County Superior Court reassigning cases and rehearing matters. (A.A. at pp. 492-493.)

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[8] As the first appeal only concerned the trial over the Association's complaint, the Court of Appeal's conclusion that all disputes were moot except the installation of the sculpture and gates was accurate as to only the trial of the Association's complaint for injunctive relief. The consolidated complaint for breach of fiduciary duty remained to be tried.

Before the lifting of the stay imposed on June 30, 2004 on the basis of the pending consolidated first amended complaint for breach of fiduciary duty, or commencement of trial of that complaint, or entry of any final judgment in the case, Bisnos filed a statement of disqualification under the California statute, filed a motion to dissolve the previous injunction on the ground that Judge Nelson was likely mentally incapacitated at the time of trial, and the matter came on for hearing before a newly-assigned judge. (A.A. at pp. 441- 609.)[9]

When the new judge denied relief, the Bisnos appealed the trial court's refusal to dissolve the injunction on the basis of the timely statement of disqualification and other evidence of potential mental incapacity at the time of trial. (App., *infra*, at pp. 2sa – 3sa.) Because the breach of fiduciary duty complaint remained pending and the matter stayed, appeal was again taken under California Code of Civil Procedure section 904.1(a)(6). (*Id.*)

On second appeal, significantly, Respondent Association dropped from the procedural statement of the case in its Respondent's Brief any mention of the pending complaint for breach of fiduciary duty. (Respondent's Brief at pp. 4-7.) And later in the same brief, the Association contended, with citation to no legal authority whatsoever, that the Bisnos' statement of disqualification was untimely because it was filed after appeals had been exhausted and "after the judgment became final." (*Id.* at p. 20.) This claim of the Association was without factual foundation in the

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[9] The Association's Opposition relies heavily on the fact that Bisnos did not raise concerns about Judge Nelson's mental capacity during the first appeal. While it was highly unusual for Judge Nelson to change his mind twice over enjoining construction of the Bisnos' improvements, only when Bisnos' counsel later learned of his probable mental incapacity did counsel realize the odd behavior had a biological basis. The disqualification was then immediately filed.

record since it had previously conceded that the breach of fiduciary duty claim "remains to be tried."

Nonetheless, at oral argument, the Court of Appeal seized upon the final judgment idea, making it a crucial basis for its conclusion that the second appeal was an appeal from a "post-judgment" order. (Petition App. at p. 2a and 29a.) Despite the efforts of Bisnos' counsel to explain at oral argument that the there was no final judgment, the Court of Appeal issued a published decision relying upon its re-characterization of the second appeal as made under California Code of Civil Procedure section 904.1(a)(1) and (a)(6). (*Id.* at p. 29a.) This was impossible, as the Bisnos could not appeal under section 904.1(a)(1) with the complaint for breach of fiduciary duty still pending.

The Court of Appeal denied the Bisnos' Petition for Rehearing that specifically pointed out that the trial court had stayed the case until the outcome of the appeal. The California Supreme Court denied review and de-publication. (Petition App. at p.34a.) Thus, there remains standing a published California opinion stating that a bench trial ruling by a likely mentally impaired judicial officer cannot be remedied.

CONCLUSION

The Petition for Certiorari should be granted to enable review of this nationally and constitutionally significant issue.

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Case No. BC 275 041
(Consolidated with Case No. BC 288 585)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC.,

v.

JEANNETTE A. BISNO, et al.,

NOTICE OF APPEAL FROM INJUNCTION; EXHIBIT

Defendants Robert H. Bisno and Jeanette A. Bisno hereby appeal from the Court's Injunction dated May 7, 2004, a copy of which is attached as Exhibit "A", and from all related rulings and orders, including without limitation the Court's Orders dated June 16 and 30, 2004, which awards attorney's fees and costs in connection with such injunction. See generally CCP Sec. 904.1(a)(6)(allowing immediate appeal from order granting or denying injunction).

Dated: July 6, 2004

Case No. BC 275 041
(Consolidated with Case No. BC 288 585)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

NORTH BEVERLY PARK HOMEOWNERS ASSOCIATION, INC.,

v.

JEANNETTE A. BISNO, et al.,

NOTICE OF APPEAL FROM INJUNCTION; EXHIBIT

NOTICE OF APPEAL FROM ORDER DENYING MOTION TO VACATE INJUNCTION

***

Defendants Jeannette A. Bisno and Robert H. Bisno ("Defendants") or "the Bisnos") hereby appeal from the Court's denial of their motion to vacate injunction entered on or about January 13, 2006, which denial resulted from the Court's vacating the hearing date on the Bisnos' Motion To Vacate Injunction calendared for January 17, 2006 without reassigning a new hearing date and without continuing the existing stay of enforcement of injunction order, originally issued on December 8, 2005, and from all related rulings and orders. See Code of Civil procedure Sec. 904.1(a)(6)(allowing appeal from "...an order granting or dissolving an injunction, or refusing to grant or

dissolve an injunction."

The Bisnos reserve their right to re-file or recalendar their Motion to Vacate Injunction or to take other appropriate action before the trial court, after this matter is reassigned to a different trial judge. See Allstate Ins. Co. v Orlando (1968) 262 Cal.App.2d 858, 868 (allowing case to continue despite pending injunction appeal). In the meantime, the pending mandatory injunction is stayed pending this appeal. See Palmco Corp. v. Superior Court (1993) 16 Cal.App.4th 221, 224; 9 Witkin, California Procedure (4th Ed), Appeal, Sec. 276, p.320

Dated: January 17, 2006